Physicians & Surgeons Ambulance Service, Inc. d/b/a American Medical Response *and* Teamsters Local 507 a/w International Brotherhood of Teamsters. Case 8–RC–17008

November 30, 2010

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

The National Labor Relations Board has considered objections to an election held on November 19, 2009, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. An initial tally of ballots was issued, followed by a revised tally of ballots that shows 19 for and 17 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

The issue raised by the Employer's exceptions is whether the Board agent set up the polling area in a manner that compromised the secrecy of the voting process. The Regional Director issued a report recommending overruling the objections. We adopt the Regional Director's recommendation.

The polling place was a crew room located inside the Employer's operational facility. The voting booth set up in this room was the Board's "table-top" model, a structure that resembles a lectern desk used by a teacher for classroom instruction. Unlike the Board's standard metal booth, which is a stand-alone cubicle with curtains that shield voters from head to lower torso, the Board's alternative table-top booth shields voters' lower arms and hands as they mark their ballots within the hollow confines of the booth.

The Board agent placed the voting booth on a table 4 or 5 feet away from a second table where she and the observers sat. There is nothing in the record to suggest that the Employer objected to this arrangement at the time. The Employer now argues on exception that because this setup allowed the observers to see the faces and arm movements of voters as they marked their ballots, the election lacked both privacy and secrecy and must be set aside. We disagree.

In order to set aside an election based on Board agent misconduct, there must be evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.,* 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Where, as here, the alleged misconduct is the Board agent's failure to ensure the secrecy of voter balloting, the Board will not set aside the election under the *Polymers* standard absent evidence that someone witnessed how a voter marked his or her ballot. *Avante At Boca Raton*, 323 NLRB 555, 558 (1997).[1]

No such evidence was presented in this case. Although the Employer submitted the affidavits of two voters, whose statements generally contested the Board's failure to provide them a more private voting environment, the affiants did not assert that anyone saw how they or any other voter marked their ballots. Indeed, they did not even state that they had the impression that their ballot choices were witnessed. Absent evidence that their ballots were seen, we find no basis under the *Polymers* standard to question the fairness and validity of the election.[2]

Our dissenting colleague would set aside the election because the close proximity of the voting booth to the observers "could have led employees to believe that they were being observed as they voted," citing *Crown Cork & Seal Co. v. NLRB*, 659 F.2d 127, 131 (10th Cir. 1981), cert. denied 454 U.S. 1150 (1982). This is not the correct analysis in this case. Although the Board has set aside elections based on voters' beliefs that they could be observed while voting, even if their ballots were not ob-

[1] Accord: *St. Vincent Hospital*, 344 NLRB 586, 587 (2005) (election not set aside because "there was no evidence" that the two employees who may have been in the voting booth at the same time "observed how the other was marking his or her ballot").

Contrary to the Employer's assertion, Objection 2 in *Avante* was not limited to the close proximity of the ballot box to observers. It also alleged that the "voting arrangements in the polling area . . . created the impression that the observers and others could determine how employees voted in the election." 323 NLRB at 557. In support of this allegation, the employer presented employee Taylor who testified that she thought she could be seen marking her ballot in the voting booth by the seated observers. Id. at 558 fn. 11. In overruling Objection 2, the hearing officer concluded that no one witnessed Taylor's or any other voter's ballot choice inside or outside the voting booth (notwithstanding that a translator was situated 2 to 6 feet from the voting booth). The Board affirmed that finding.

[2] We do not decide whether an election is to be set aside under *Avante* if the evidence shows only that voters had the impression that their ballot choices were witnessed. Assuming, arguendo, that the holding in *Avante* should be interpreted this way, the evidence fails to establish that any voter harbored this impression.

Having fully considered the Employer's proffered evidence, we also reject its alternative request that the case be remanded for a hearing on its objections, as the objections fail to raise substantial and material issues warranting a hearing.

served, it has done so only in cases like *Columbine Cable Co.*, 351 NLRB 1087, 1088 (2007), where employees "voted without . . . a voting booth or a completely private room."[3] The Board has never set aside an election on this basis where, as here, the election was conducted using a Board-sanctioned voting booth. When such a booth is used, the Board's analysis is limited to whether a voter's ballot marking was observed by others while voting, or before the ballot was deposited in the ballot box.[4]

The Employer having failed to present evidence that voters' ballot choices were seen by others, either inside or outside the confines of the voting booth in this case, we adopt the Regional Director's recommendation to overrule the Employer's objections and certify the Petitioner.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 507 a/w International Brotherhood of Teamsters, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time wheelchair, EMT basic, EMT intermediate, and EMT paramedics employed at the Employer's facilities located at Cleveland East 26309 Miles Road Suite 6, Warrensville Heights, Ohio, 44128 and Cleveland West 13929 West Parkway, Cleveland, Ohio, 44135 a/k/a Post 90 and Post 93, but excluding all supervisors, managerial, sales employees, professional and office clerical employees, and guards as defined by the Act.

MEMBER HAYES, dissenting.

I would set aside the election here based on the Employer's objections to the Board agent's placement of the voting booth. My colleagues and I agree that, under long-established precedent, the appropriate standard for evaluating objections alleging Board agent misconduct is whether it raises a reasonable doubt as to the fairness and the validity of the election. See, e.g., *Polymers, Inc.,* 174 NLRB 282 (1969), enfd. 414 F. 2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). We disagree on the application of that standard to the facts here.[1]

The Board agent placed the lectern-style voting booth within 5 feet of the observers' table, and directly facing them. Notwithstanding that the agent used a Board-sanctioned voting booth, as my colleagues note, the fact remains that the faces and arm movements of the voters were visible as they marked their ballots because of the use of this particular booth, combined with its placement and proximity to the observers. I find this voting arrangement compromised the secrecy of the voting process because it "could have led employees to believe they were being observed as they voted." *Crown Cork & Seal Co. v. NLRB*, 659 F.2d 127, 131 (10th Cir. 1981), cert. denied 454 U.S. 1150 (1982).[2] In fact, the Employer's exceptions include the affidavits of two employees who expressed the very belief that their privacy was compromised. Particularly in an election where a single vote change would have meant a different outcome,[3] I find the facts here sufficient to raise a reasonable doubt as to the fairness and validity of the election, requiring that it be set aside and a new election directed.[4]

[1] *Avante at Boca Raton*, 323 NLRB 555 (1997), relied on by my colleagues, applies the *Polymers* standard but, contrary to the majority, does not set out a new test requiring that someone witness how a voter marked his or her ballot in order to set aside an election under *Polymers.* Nor, contrary to the majority, are the holdings in *Columbine Cable*, 351 NLRB 1087 (2007), and *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957), where the Board found objectionable voting arrangements which led employees reasonably to doubt the secrecy of the elections, solely restricted to situations where improvised voting arrangements were used.

[2] I cite this case for the Board standard that the Court applied (a standard with which I agree) not for the case's specific facts.

[3] The closeness of the election makes even more troublesome the Regional Director's summary disposition of this objection without affording the Employer an opportunity to present evidence at a hearing. See, e.g., *NLRB v. Bristol Spring Mfg.,* 579 F.2d 704 (2d Cir. 1978), denying enforcement of 231 NLRB 568 (1977).

[4] Compare *Imperial Reed & Rattan Furniture Co.*, supra (Board set aside election, decided by one vote margin, because voters marked ballots at improvised voting table 7 feet away from observers and within their line of vision).

My colleagues ultimately claim that because the Board agent used a "Board-sanctioned voting booth," the Board's analysis is limited only to whether a voter's ballot was in fact seen while voting or before putting the ballot in the ballot box. They cite no precedent for this broad pronouncement and I am aware of none. Rather, all the circumstances of a particular election must be assessed in determining whether the secrecy of the balloting was compromised. In this case, I find that it was.

[3] Moreover, in *Columbine*, unlike here, one voter testified that his ballot was 80-percent exposed. In *Imperial Reed & Rattan Furniture Co.*, 118 NLRB 911 (1957), cited by our dissenting colleague, employees marked their ballots on an improvised table, not a Board-sanctioned booth. Notwithstanding that the observer could not see how the ballots were marked, the Board found that the arrangements were "too open and subject to observation" and set the election aside. Id. at 913. The arrangements here, in contrast, were substantially more private.

[4] *Crown Cork & Seal*, which our colleague cites, does not support his position. The election in that case was conducted with Board-sanctioned voting booths, and the issue raised by the employer's objection was not, as our colleague suggests, whether the election should have been set aside on the basis that employees could have believed that they were observed while voting. Rather, the objection stated that voters' ballot "markings and choices" could be seen by the employer's observer. The court affirmed the Board's overruling of the objection because there was no evidence that the observer witnessed an election choice while the ballots "were in the hands of voters," nor was there "evidence that the voters had reason to believe that their votes were observable while in their hands. . . ." 659 F.2d at 131.